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No. 88-2109

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE STATES OF KANSAS AND MISSOURI,
AS *PARENS PATRIAE*,
Petitioners,
vs.
THE KANSAS POWER & LIGHT COMPANY
and
UTILICORP UNITED, INC.,
Respondents.

REPLY BRIEF OF PETITIONERS

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The petition for writ of certiorari filed by the States of Kansas and Missouri should be granted. The brief in opposition fails to distinguish Judge Posner's recent opinion for the *en banc* Seventh Circuit, which reached the opposite result from the Tenth Circuit below on identical facts.

Instead of acknowledging that the Court has never directly addressed the scope of any exception to the direct-purchaser rule of *Illinois Brick* and *Hanover Shoe*,[1] the respondent utility companies merely restate the general rule itself and discuss its rationale. But it is the confusion surrounding the cost-plus *exception* to the direct-purchaser rule that needs the Court's attention. The proper scope of that exception is squarely presented here.

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1. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

I. The Tenth Circuit's Refusal to Apply the Exception to the Illinois Brick Direct-Purchaser Rule Recently Recognized by the En Banc Seventh Circuit Creates a Direct Conflict on a Pure Question of Law.

This case presents a pure question of law: is there an exception to the general rule that only direct purchasers have standing to sue where there is a perfect and easily-provable pass-through of all illegal overcharges to residential utility consumers? In granting summary judgment below, the Tenth Circuit *assumed* a perfect pass-through and answered "no"; after considering the record in *Panhandle Eastern*,[2] the Seventh Circuit *found* these same facts, and answered "yes." The Court should grant certiorari to resolve this purely legal conflict.

Respondents' supposed "distinctions" between this case and *Panhandle Eastern* are neither meaningful nor relevant. The utilities first suggest that the claims of the direct-purchaser utility in *Panhandle Eastern* may have been time-barred. Whether the *direct* purchaser's claims happen to be barred should not affect the standing of *indirect* purchasers under the cost-plus exception. The present case in any event is no different from *Panhandle Eastern* in this respect because claims of UtiliCorp, one of the two plaintiff utilities below, may be time-barred as well.[3]

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2. *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Corp.*, 852 F.2d 891 (7th Cir.) (en banc), *cert. denied*, 109 S.Ct. 543 (1988).

3. Although UtiliCorp was a plaintiff in this case in 1985, it dismissed its Complaint in February, 1986, and did not seek to re-enter the litigation until it filed a motion to intervene in June, 1987.

Respondents' argument that the indirect purchasers in *Panhandle Eastern* were all residents of a single state also presents no meaningful distinction. Although the consumers here reside in two states, Kansas and Missouri, the regulatory mechanisms in those states operate identically to require 100% of the overcharges incurred by the utilities to be passed on to the residential consumers.[4] Because the end result to Missouri and Kansas residents is the same, the fact that they reside in different states cannot matter.

The suggestion that more than 50% of the respondent utilities' claims will be lost if the states are granted standing, while in *Panhandle Eastern* no overcharges were "sacrificed," is also without merit. Although *Panhandle Eastern* allowed the State of Illinois to recover all illegal overcharges incurred by residential customers, the overcharges incurred by the commercial and industrial customers (these customers do not fit within the exception to the direct-purchaser rule) were still recovered by the utilities, as were the utilities' own lost profits. App. E, A54-58. Application of *Panhandle Eastern's* reasoning yields the same result in the present case: no overcharges will be sacrificed.[5] Claims will be lost only if the petitioner states are *not* allowed to assert claims on behalf of their residents.[6]

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4. *See* Petition for Writ of Certiorari at 4, n.3.

5. In its brief in the Tenth Circuit, UtiliCorp conceded that its "recovery of damages on behalf of its industrial customers is unaffected by the Seventh Circuit's opinion in *Panhandle Eastern*." *See* Brief for Plaintiff-Appellee UtiliCorp United, Inc. at 20-21.

6. Because at least one Kansas utility did not file suit to recover the overcharges it passed on, the claims of more than 50,000 Kansas residential consumers will be lost if the states

(Continued on following page)

Respondents' final argument—that the precise percentage of overcharges they passed through to consumers may be factually unresolved—also misses the mark. At no point do respondents deny what is in fact the case: they passed on *all* overcharges incurred. Moreover, the Tenth Circuit "assume[d] . . . for the purpose of deciding the issues before [it] that there was a perfect and provable pass-on of the allegedly illegal overcharge." *See* App. A, A14. Both the decision below and *Panhandle Eastern* thus involved a 100% pass-on of the illegal overcharges.

The decision below conflicts with *Panhandle Eastern* on an important question of antitrust law that the Court has never directly addressed. The petition should be granted.

II. Respondents' Reliance on California v. ARC America Is Misguided Because the Court There Did Not Address the Scope of the Cost-Plus Exception.

Respondents contend that the precise scope of the cost-plus exception has already been fully explained by the Court. But respondents cannot point to a single case where the Court has considered a concrete exception to the direct-purchaser rule. Neither *Hanover Shoe* nor *Illinois Brick* announced an actual exception to the rule; the Court instead merely suggested that under certain circumstances *not presented* in those cases an exception *may* exist.

Footnote continued—

are denied standing. *See* Petition for Writ of Certiorari at 4, n.2. If, as seems likely, respondent UtiliCorp's claims were not timely filed, the claims of the many Missouri residents who were customers of that utility also will go unredressed if the *parens patriae* claims are not allowed to proceed.

California v. ARC America[7] did not end the confusion. There the Court also did not directly consider the cost-plus exception,[8] but once again simply suggested that such an exception *might* exist on appropriate facts: "[W]e implicitly recognized [in *Illinois Brick*] . . . that indirect purchasers *might* be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them." 109 S.Ct. at 1666, n.6 (emphasis added).

It is this Court's discussion of hypothetical exceptions, rather than real ones, that led to the present conflict between the Seventh and Tenth Circuits. In holding that the residential consumers here lack standing despite the same perfect and provable pass-through of overcharges considered by the Seventh Circuit, the Tenth Circuit stated: "[T]he Supreme Court did not say this would constitute an exception but rather that it 'might be,' and for this reason we have narrowly construed the exception . . . ." App. A, A8.

The antitrust damages in the present case, involving a readily-identifiable, 100% pass-through of all overcharges, would be "easy to prove" within the meaning of *ARC America* and *Illinois Brick*. The state attorneys general, proceeding as *parens patriae* on behalf of their injured state residents, have ample incentive to sue; the utilities' own incentive is questionable in view of their complete pass-through of overcharges. This case thus presents the very facts the Court has repeatedly indicated "might" constitute an exception to the direct-purchaser rule. Certiorari should issue to clarify whether and to what extent such an exception actually exists.

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7. *California v. ARC America*, 109 S.Ct. 1661 (1989).

8. The issue in *ARC America* was instead whether *Illinois Brick* and *Hanover Shoe* preempted state antitrust laws permitting indirect purchaser suits.

CONCLUSION

Whether the interests of residential consumers are better represented by the utilities that passed on all overcharges to them, or by state attorneys general acting in their *parens patriae* capacity, is a question of considerable importance to antitrust enforcement. The Court should issue a writ of certiorari to review the decision of the Tenth Circuit and to resolve the split of authority in the circuits that now exists.

Respectfully submitted,

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